No. 96-1184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May petitioners, who are former members of the plaintiff class in an earlier state action and who purport to represent substantially the same class membership in the instant case, evade the *Rooker-Feldman* jurisdictional doctrine and collaterally attack the state court's fact-intensive determination of fair fees for class counsel by asserting that notice of the fairness hearing upon a proposed class settlement and class counsel's fee petition violated due process, notwithstanding:

— that the state court adjudicated the question of its jurisdiction, finding that the notice complied with due process and that the court had jurisdiction over class members;

and

— that the allegedly deficient notice was, in fact, sufficient to prompt members of petitioners' class to prevail upon the Florida Attorney General to intervene on their behalf in the state proceedings and actively litigate the issue of reasonable fees;

and

— that those intervening class members successfully prevailed upon the state court to award lower fees than those sought by counsel;

and

— that those intervening class members then elected not to appeal that state court ruling.

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs below): Dexter J. Kamilewicz, Gretchen L. Kamilewicz, and Martha E. Preston, on behalf of themselves and all others similarly situated.

Respondents (defendants below): Bank of Boston Corporation and BancBoston Mortgage Corporation were named defendants in the earlier state class action which is the subject of this litigation. Bank of Boston Corporation has no parent company and has the following non-wholly owned subsidiaries: Boston Equiserve, Thor Credit Corporation, and HomeSide, Inc. The parent company of BancBoston Mortgage Company is HomeSide, Inc. BancBoston Mortgage Company is now known as HomeSide Lending, Inc., and it has no non-wholly owned subsidiaries.

Burr & Forman and specifically T. Thomas Cottingham, represented the banks in the state action.

Ezell & Sharbrough, Mark Ezell, and John W. Sharbrough, III were the principal attorneys for the plaintiff class in the state action. They are not, however, before this Court as petitioners did not effect service of process upon them.

Edelman & Combs; Daniel A. Edelman; Lawrence Walner & Associates; Lawrence Walner were additional counsel for the plaintiff class.

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OPINIONS BELOW

The District Court's opinion is not published. It is instead available from online services at *Kamilewicz v. Bank of Boston Corp.*, No. 95 C 6341, 1995 U.S. Dist. LEXIS 18973 (N.D. Ill. Dec. 15, 1995), or *Kamilewicz v. Bank of Boston Corp.*, No. 95 C 6341, 1995 WL 758422 (N.D. Ill. Dec. 15, 1995). The Court of Appeals' opinion is reported at *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996). The dissent from the Court of Appeals' denial of rehearing and suggestion for rehearing *en banc* is reported at *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996).

STATEMENT OF JURISDICTION

The District Court's judgment was entered on December 15, 1995. The Court of Appeals' judgment was entered on August 8, 1996. Plaintiffs' petition for rehearing was denied on November 22, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

> out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 1, of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

COUNTER-STATEMENT OF THE CASE

An Embarrassment Petitioners Would Wish Away

Petitioners' statement of the case is inaccurate and incomplete in several material respects. Most notably, petitioners have not disclosed the critical role played by the Florida Attorney General. The Florida Attorney General has proven to be such an embarrassment to petitioners that they have apparently taken the drastic step of terminating his role as their *amicus*.[1] Petitioners claim to be representatives of the former members of the plaintiff class in an earlier state class action[2] (hereinafter *Hoffman).* (Pet. App. 59, 65) In fact, a significant contingent of petitioners' putative class (the Florida members of the plaintiff class), acting through the Florida Attorney General, had intervened in *Hoffman* and actively litigated the very questions (the value of the settlement and a fair fee award for class counsel) petitioners now seek to have the federal court review in violation of the *Rooker-Feldman* jurisdictional doctrine.

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[1] The Florida Attorney General served as *amicus curiae* supporting petitioners before the Seventh Circuit.

[2] The class action was filed in Alabama where the named plaintiffs and a large percentage of the plaintiff class resided. BancBoston Mortgage Company was located in Northern Florida and was primarily a regional servicer. The case was filed in Mobile County under the style and caption of Hoffman, et al. v. BancBoston Mortgage Corp., No. CV-91-1880.

A Claim Inextricably Intertwined With Earlier State Proceedings

Petitioners vaguely assert that respondents somehow perpetrated a fraud upon the *Hoffman* court and that, as a consequence, that court's award of fees to class counsel unfairly exceeded one-third of the economic benefit of the class settlement. (Pet. App. 52-53)

The *Hoffman* court, which had earlier certified the class pursuant to Alabama Civil Procedure Rule 23(b)(2)[3] and granted the plaintiff class partial summary judgment, conducted a fairness hearing on January 10 and 11, 1994, and by order entered January 24, 1994,[4] approved the proposed settlement of the class action, rejected class counsel's request in their fee petition for a fee equivalent to one-third of the economic benefit of the settlement and awarded fees, which it specifically determined to be less than one-third of that benefit.

The Value Of The Class Settlement

The class settlement required the defendant, BancBoston, to stop overcharging its mortgagors the amounts required to be paid into and retained in their escrow accounts, refund the excess already in those accounts (19% of the amount held in escrow) and pay the mortgagors interest on the sums which had been wrongfully held. (Resp. App. 10-11) The court considered tes-

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[3] Alabama Rule 23 is identical to Federal Rule 23.

[4] Petitioners did not provide this Court with the *Hoffman* decision of 1/24/94, which decided the very question now resurrected by this lawsuit. That order is set forth in Respondents' Appendix 4-18.

timony, including that of experts, and documentary evidence adduced upon the two-day fairness hearing and entered its order of January 24, 1994, identifying several categories of economic and non-economic benefit, both present and future. The court determined that that benefit included the time value of the money which, but for the settlement, would not have been refunded until the mortgages ended and the money which, again, but for the settlement, would have been paid into escrow *in futuro*.

The court further decided that the fee determination should be based upon that economic benefit:

> In this case, because of the broad responsibilities and risks assumed by class counsel, and the unprecedented results achieved by Class counsel, Class counsel's efforts merit a fee based upon a percentage of the economic benefit conferred by this settlement. The total fee recovery as set out below is found to be reasonable in light of the fact that the future benefit conferred upon the Class by this Consent Decree is substantial and is at least as valuable to the Class as the immediate refund to the Class of the settlement proceeds from the common fund. This Court makes this determination after taking into . . . account the objections of the Florida Attorney General. (Resp. App.16-17)

The Court further determined the minimum value of the economic benefit and that the fees should be 28% of that sum—and not the one-third sought by class counsel. The fees thus calculated and awarded approximated $8.5 million (not $14 million as asserted by petitioners) and that included both fees to be allocated among all of the several class counsel and costs.

Petitioners' Federal Claim:
A Denial Of the Time Value Of Money

Petitioners' challenge to the fairness of the fees is based on their denial of the time value of money, asserting that the only benefit to members of the plaintiff class was the interest which the defendant in *Hoffman* was required to pay to class members. (Pet. App. 52 and 53) The district court below, Judge Plunkett presiding, identified the gist of petitioners' claim as one inextricably intertwined with the very question decided by the *Hoffman* court:

> The plaintiffs here allege that the true economic benefit to the plaintiff class in the *Hoffman* litigation was only the interest payment. . . . (Pet. App. 21, 31)

The district court dismissed this action, pursuant to Fed. R. Civ. P 12(b)(1) for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine,[5] stating:

> [T]he plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment . . . we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees. (Pet. App. 31)

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[5] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Petitioners' Belated Attack Upon The Jurisdiction Of The *Hoffman* Court

The focus of petitioners' argument before this Court—their challenge to the *Hoffman* court's jurisdiction over the members of the plaintiff class—is an afterthought not pled in their complaint. (Pet. App. 49-105) Petitioners first raised the assertion in response to and in an effort to evade respondents' *Rooker-Feldman* defense. Nevertheless, petitioners have repeatedly insisted that they do not "seek to overturn the Alabama judgment." (Pet. Opening Brf. before 7th Cir. at 4) Thus, the Court of Appeals described petitioners' contradictory attack upon jurisdiction as "shifting sand." (Pet. App. 6)

Also, notice[6] to class members, effected both by first class mail and publication, advised them in neutral terms of the nature of the lawsuit; the proceedings to date; the general terms of the proposed settlement; that only "some" class members would receive a payment of interest or a cash refund; that others would receive a credit; that fees, if awarded, would "be paid out of each

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[6] Although petitioners attack the notice, they did not place it in the record. That notice is a matter of record in the *Hoffman* case. Also, it was published in *USA Today* on December 13 and 20, 1993. A federal court may take judicial notice of the records of an inferior court in other cases. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). Also, since items published in newspapers are "capable of accurate and ready determination" such items may be the subject of judicial notice. *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1356 (3rd Cir.) *cert. denied*, 115 S.Ct. 62 (1994); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995); *Wilson v. Schwarz*, 99 F.3d 1141(6th Cir. 1996). Pertinent portions of the notice are set forth in respondents' appendix (Resp. App 1-3).

escrow account"; the availability upon request of more detailed information; the hearing date; the subject ("whether" the proposed settlement is "fair, reasonable and adequate" and whether class counsel should be awarded fees and if so, the amount thereof) and the right of class members to appear and object or opt out. The notice, the content of which was prescribed by the *Hoffman* court (Pet. App. 70), described class counsel's fee petition as follows:

> Class Counsel will request the Court to award them a reasonable attorney fee to be paid out of each escrow account based upon the benefit conferred on the class . . . Class Counsel has indicated that they will request a percentage not to exceed one-third of the economic benefit conferred on the class as a result of this settlement. The Court will decide whether or not to award attorneys' fees to class counsel at the fairness hearing scheduled for January 10, 1994. (Resp. App. 2-3)

Petitioner, Martha Preston, admitted that she personally received the notice. (Doc.37, Aff. of Martha E. Preston)[7]

The *Hoffman* Court's Adjudication Of Its Jurisdiction

The *Hoffman* court initially approved the class notice on December 6, 1993 (Doc.22, Exh. A, p.3), thereafter heard evidence on the reasonableness of notice and, by order of January 24, 1994, specifically held that both the personal notice and notice by publication complied with

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[7] All citations to a "Doc." number are citations to the Record on Appeal before the Seventh Circuit.

due process requirements, giving the members of the plaintiff class ample opportunity to object to both the proposed settlement and fees. (Resp. App. 15-16) The Court's order states:

> The notice given to members of the Class by publication and by mail . . . complied with all requirements of due process, all requirements of Rule 23 of the Alabama Rules of Civil Procedure, and constituted the best notice practicable under the circumstances. (Resp. App. 15)

The Sufficiency Of The Notice

In their argument before the Court of Appeals, petitioners asserted that the notice approved and effected in *Hoffman* gave them "no opportunity to raise their claims in the state action." (Pet. Opening Brf. before 7th Cir. at 24) In fact, the Florida Attorney General intervened in *Hoffman* at the behest of and on behalf of Florida members of the class who had received that notice. (Doc. 39, Exhs. A & B)

Petitioners' Representation That Their Arguments Challenging Fairness Were Not Made In *Hoffman*

In support of their accusation of fraud, petitioners made the following representation to the Court of Appeals:

> [A]t no time during the fairness hearing was . . . the fact that most, if not all, of the *Hoffman* class members would suffer a net out-of-pocket loss even mentioned. . . much less raised, argued, briefed or decided. (Pet. Reply Brief before 7th Cir. at 10)

In fact, the Florida Attorney General made that very argument in *Hoffman*. In a brief which he filed in *Hoffman*, "in opposition to approval of . . . class counsel's fee request," the Florida Attorney General argued that "the benefit to class members has been overstated" (Doc. 39, Exh. B at 8) because payment should be determined by the interest which was to be paid by BancBoston and not upon consideration of the future value of money. Also, in his cross-examination of a witness, the Florida Attorney General specifically asked about the possibility "that somebody could end up with less money after this settlement in their escrow account than they did before[.]" (Doc. 39, Exh. A at 77)

The Florida Attorney General's Admission: The Benefit To The Class Was At Least $32 Million

In *Hoffman*, the Florida Attorney General argued that the court should reject the evidence adduced upon the two day fairness hearing that the economic benefit to the class members exceeded $42 million. The Florida Attorney General argued that the economic benefit instead approximated $32 million. (Doc. 39, Exh. B at 2, 3, 13, 14, 18)

The *Hoffman* Court's Decision Upon The Supplemental Proceedings: No Fraud

At the time their motion to dismiss this action was pending below, those respondents who were counsel for the plaintiff class in *Hoffman* filed a motion before the *Hoffman* court asking that court to direct petitioners to

show cause why they should not be bound by that court's adjudication of January 24, 1994. The court treated plaintiffs' complaint in the instant case as an Alabama Rule 60(b) motion for supplemental relief and scheduled a hearing for December 18, 1995. The *Hoffman* court had, by its order of January 24, 1994, retained jurisdiction, "for the purpose of adducing evidence regarding the fairness, reasonableness and adequacy of the Decree, for the purpose of hearing any objections to the Decree or any provision thereof, and for the purpose of determining the fairness, reasonableness and adequacy of the Decree . . . ." (Resp. App. 22) Also, the court directed counsel to have summons served upon petitioners and directed petitioners to substantiate their accusations. (Doc. 39, Exh. C at 2)

Referencing the scheduled hearing of December 18, 1995 the *Hoffman* court stated:

> The respondents allege that a fraud was perpetrated upon this Court and further that information which was material to these deliberations was withheld by class counsel. Furthermore, Mr. Kamilewicz has contacted this Court regarding this matter.
>
> * * *
>
> [A]t that time they will be given an opportunity to present evidence and testimony in support of their allegation challenging this Court's final order in this matter. (Doc. 39, Exh.C at 1, 2)

In the order below granting respondents' motion to dismiss, the district court made the following comment relative to that scheduled hearing:

> If the defendants did perpetrate a fraud upon the Alabama court, as the plaintiffs have alleged, then the state court was an innocent victim of it; that is

> a far cry from being prejudiced against the plaintiffs . . . Moreover, if the plaintiffs address their concerns to the Alabama court now and can substantiate their claims, that court is likely to be outraged by the defendants' conduct. (Pet. App. 32)

Petitioners, who had received the summons and notice of the December 18 hearing, sent a representative to the *Hoffman* court, stating their refusal to participate. (Pet. App. 111)

The *Hoffman* court nevertheless proceeded to conduct the scheduled hearing and by order entered January 30, 1996 made the following findings:

- that the court has personal jurisdiction over plaintiffs;
- the due process requirements have been satisfied and plaintiffs' claim that the court lacks jurisdiction is meritless;
- that the substance of plaintiffs' arguments concerning the alleged excessiveness of fees was raised, argued and briefed by the Florida Attorney General and was fully adjudicated and decided by the Court;
- that defendants did not perpetrate a fraud upon the court;
- that plaintiffs' allegations of misrepresentation and fraud upon the court are "baseless." (Pet. App. 106-118)

ARGUMENT

PRELIMINARY

THE CASE PETITIONERS DESCRIBE IS NOT THE CASE BEFORE THIS COURT

A Spurious Claim Of Fraud

Petitioners' claim of fraud is hyperbole or, as the district court below described it, mere "dress[ing]". The transcript of the *Hoffman* court's fairness hearing and the Florida Attorney General's brief, both of which are in the record, demonstrate on their face that the Florida Attorney General aggressively participated in the proceedings, that no evidence was withheld and that his participation was unfettered.

Petitioners' federal lawsuit, stripped of this hyperbole, simply asserts that the *Hoffman* court erred in its determination of "what" is the value of the benefits conferred by class counsel. In its opinion below, the district court summarized the point:

> Even though their request for relief is dressed up as damages under RICO, section 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment. (Pet. App. 31)

Additionally, members of petitioners' class who intervened in *Hoffman via* the Florida Attorney General participated in litigating the issue of fees. Those litigants had every right to challenge the *Hoffman* court's fairness determination by appealing. Instead, petitioners have opted to repeat those very arguments before the federal court asserting that the only economic benefit resultant

from the settlement was the defendant bank's payment of interest to the mortgagors.

There is only one significant difference between the arguments presented below and those advanced in *Hoffman*. In *Hoffman*, the Florida Attorney General admitted that the future value of money constituted a substantial economic benefit and, further, that the economic benefit approximated $32 million. (Doc. 39, Exh. A, Exh. B at 8-13)

That admission, on its face, makes plain that the fees awarded did not exceed one-third of the economic benefit.

A Contrived Due Process Claim

Petitioners' assertion that they were denied due process is unfounded. The notice of class action and proposed settlement (Resp. App. 1-3) assiduously adhered to the requirements of due process as established by case law.[8] The notice is neutral as to the merits of the assertions of the parties, identifies class counsel's request for fees, states that the fees will be paid out of the escrow accounts, that some class members will not receive an immediate money pay out, and that the amount of fees, if any, is a subject of the scheduled fairness hearing.

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[8] *See e.g.*: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977); *Handschu v. Special Services Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986); *Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977); *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075, 1086 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984).

Petitioners' Mischaracterization Of The Court of Appeals' Decision

Petitioners' assertion that the Court of Appeals held that *Rooker-Feldman* deprives a federal court of jurisdiction "even if" the state court did not have jurisdiction (Pet. at 13) is ludicrous. It is axiomatic that a judgment is not entitled to full faith and credit if the court rendering the judgment did not have jurisdiction. The Court of Appeals simply and correctly held that the jurisdictional question was resolved by the *Hoffman* court's determination that there was a substantial benefit to the class and that the class notice passed constitutional muster.

Petitioners also wrongly assert that the Court of Appeals held that *Rooker-Feldman* broadly precludes actions for legal malpractice. (Pet. at 26) The Court of Appeals' decision is narrow and limited to the facts of this unique case. *Rooker-Feldman* precludes *this action*, which petitioners loosely—and indeed inaccurately—describe as one for malpractice, only because that claim is inextricably intertwined with the state court's determination that the fees awarded are fair and substantially less than one-third of the economic benefit of the class settlement. Under *Rooker-Feldman* that ruling conclusively establishes that there was no "malpractice" here.

No Precedential Value

Respondents respectfully submit that petitioners' mischaracterizations are designed to mask the fact that this case involves unique circumstances which militate against its value as precedent. The *Hoffman* court provided a safeguard for absent class members by appointing a Special Master to effectively act as their guardian

ad litem and the court specifically referenced and considered that Master's special report in its decision of January 24, 1994. Additionally, this case cannot provide precedent for any class action where, in contrast to the instant case, the class members did not participate in litigating the very issue they now challenge by "appeal" to the Federal District Court.

I.

THE *ROOKER-FELDMAN* DOCTRINE HAS WITHSTOOD THE TEST OF TIME.

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931)

The issue of fairness was, contrary to Judge Easterbrook's dissent, specifically litigated in *Hoffman* and that issue, "once tried", should be forever settled. In the order of January 30, 1996, the *Hoffman* court stated:

> [T]he substance of Respondents [sic] arguments concerning "economic benefit" and the possible "net loss" to some class members was raised, argued and briefed by the Florida Attorney General's office. Therefore, these arguments have already been fully adjudicated and decided by this Court. (Pet. App. 114)

Petitioners cannot evade this reality upon their vague and undefined allegations of fraud. "Fraud upon the court," justifying an attack on a judgment, is a limited kind of fraud. It is fraud that "defiles the court itself or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner

its impartial task of adjudging cases that are presented for adjudication." *Kenner v. Commissioner*, 387 F.2d 689, 691 (7th Cir.); *cert. denied*, 393 U.S. 841 (1968). There must be "the most egregious conduct involving a corruption of the judicial process itself," such as bribery of a judge or similar improper influence on the court. Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 2870, pp.418-19 (1995). *See also Browning v. Navarro*, 826 F.2d 335, 344-45 n.12 (5th Cir. 1987). Petitioners have specifically acknowledged that the *Hoffman* court was not a party to and did not participate in any alleged wrongdoing. (Doc.36 at 5 n.5, 13 n.8; Doc.37 at 4)

Additionally, the proper forum in which to assert that a party has perpetrated a "fraud upon the court" is the court which allegedly was the victim of that fraud—the claim cannot be made in another court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-50 (1944); *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 706 (7th Cir. 1987); *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808-09 (7th Cir. 1969); Wright, Miller & Kane *supra*, at 411. The *Hoffman* court specifically found, in its order of January 30, 1996, that no evidence had been withheld and that the allegations of fraud are "baseless." (Pet. App. 117)

Petitioners' federal lawsuit, no matter how "dressed up" with allegations of RICO violations, fraud or malpractice, essentially asserts nothing more than that the *Hoffman* court erroneously awarded too large a fee. That, under *Rooker-Feldman*, may not be re-litigated. The *Rooker-Feldman* doctrine is a sound and established principle and there is no reasonable alternative to the conclusion that the facts before this Court require its application. *Johnson v. DeGrandy*, 512 U.S. 997, ___, 114

S. Ct. 2647, 2653-54 (1994); *Howlett by Howlett v. Rose*, 496 U.S. 356, 369, 370 n.16, 372-73 (1990); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989).

The class petitioners seek to represent is the plaintiff class in *Hoffman* and, as such, all members of that class who did not opt out are bound by the adjudications of the *Hoffman* court—particularly since the Florida contingent of petitioners' class intervened in *Hoffman via* the Florida Attorney General and actively litigated the issue of reasonable fees, presenting the very arguments they now bring to the federal court.

II.

PETITIONERS' ASSERTIONS OF A DUE PROCESS VIOLATION ARE CONCLUSIVELY PRECLUDED BY THE *HOFFMAN* COURT'S DETERMINATION OF ITS OWN JURISDICTION.

Petitioners' attack upon the jurisdiction[9] of the *Hoffman* court is an unsupported conclusory afterthought, contrived in a desperate effort to evade *Rooker-Feldman*. The sufficiency of the notice, the pertinent content of

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[9] Among petitioners' mischaracterizations is their inapt attempt to analogize themselves to a defendant class for the purpose of by-passing this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in favor of the *International Shoe* minimum contacts test. Aside from the fact that several courts have found that minimum contacts are not needed between a defendant class and the forum state (*see, e.g., Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 139-40 (7th Cir. 1974), the fact remains that petitioners are not a defendant class. That fact, along with the fact that the *Hoffman* court determined its jurisdiction over petitioners, demonstrates clearly that this is not an appropriate case for this Court to decide the issue of whether *Shutts* applies to defendant classes.

which appears in Respondents' Appendix, pages 1-3, is evident on its face. Further, its sufficiency is confirmed by the fact that that notice prompted the intervention of the Florida Attorney General at the behest of and on behalf of the Florida members of the plaintiff class. The fact that that notice prompted a vigorous objection from a significant contingent of the class members establishes that that notice has necessarily served its due process objectives. *Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2nd Cir. 1986); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963-64 (3rd Cir. 1983).

Moreover, the sufficiency of the notice was adjudicated, not once but three times by the *Hoffman* court. The court approved the notice on December 6, 1993; determined by order of January 24, 1994 that the notice was the "best notice practicable" and that it complied with due process; and again on January 30, 1996 that there was no violation of due process. (Resp. App. 15; Pet. App. 112-113) The *Hoffman* court's decision is conclusive under the Full Faith and Credit Act, 28 U.S.C. § 1738, which directs federal courts to defer to state judgments. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). A state court is fully competent to decide constitutional issues, including those that go to its jurisdiction and where, as here, that issue has not been challenged by appeal, it is conclusive—"erroneous or not." *Underwriters Nat'l Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 714 (1982); *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

As the Court of Appeals noted, there are "significant differences between default judgments and the judgment under attack here." (Pet. App. 10) Petitioners, who purport to represent the plaintiff class, received notice of

both the *Hoffman* fairness and supplementary proceedings. Also, those members of the plaintiff class who responded to that notice by enlisting representation by the Florida Attorney General, participated in the *Hoffman* proceedings but elected to forego appeal of that court's determination of jurisdiction. The plaintiff class members thus wrongly denied the Alabama Supreme Court the opportunity to determine whether its rules governing class action notice provisions satisfy due process and whether to exercise its power to amend those rules to avoid potential constitutional challenges. *See, e.g.*: *Adams v. Robertson*, No. 95-1873, 1997 WL 85127, at *1 (U.S. Ala. Mar. 3, 1997).

III.

PETITIONERS' CHARACTERIZATION OF THEIR CLAIM AS ONE FOR "MALPRACTICE" CANNOT CAMOUFLAGE THE FACT THAT THIS CASE IS EFFECTIVELY AN APPEAL FROM THE ADJUDICATIONS OF THE *HOFFMAN* COURT.

The Seventh Circuit's decision does not stand for the proposition that class counsel may not be sued for legal malpractice. Judge Easterbrook's concern, expressed in his dissent that the panel's decision may stand as precedent barring all malpractice actions, is unsupported by the cases cited by Judge Easterbrook and indeed is improvident. Petitioners' characterization of their claim as one for malpractice cannot obviate the essence of their claim, which is essentially that the *Hoffman* court erroneously decided the amount of fees to be awarded class counsel.

This is a far different question from the one considered in *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), the principal case relied upon by Judge Easterbrook. The

Durkin court held that class counsel could be sued in malpractice only because that claim did not require the second court to re-litigate any question determined in the earlier class action litigation. The subsequent malpractice action was appropriate because, as the court specifically held, the earlier settlement had decided a question substantially different from that presented by the malpractice action: the determination that payment was reasonable for Rule 23.1 settlement purposes was not the same as the question whether competent counsel could have effected more favorable terms. 92 F.3d at 1516.

The instant case presents a marked contrast. There is no claim that the class should have obtained more benefits. The *only* question is the fact intensive question of "what" is the economic value of those benefits. Petitioners' claim, albeit "dressed up" as one sounding in malpractice, would necessarily reopen the question already directly decided by the *Hoffman* court: the amount of fees which are reasonable and fair in light of the work performed and the economic benefit secured. Petitioners' assertion is that the fees were simply too high and that assertion is one which, under *Rooker-Feldman*, could properly have been pursued only by appellate review. Significantly, Judge Easterbrook made that very point in *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995). The court there ruled that the plaintiff, who had lost an earlier state court civil rights action, effectively sought nothing less from the federal court than collateral review of that state court judgment and such a plaintiff must be sent "where he belongs—the original courts."

Petitioners eschewed that remedy—on several occasions. Their members who intervened *via* the Florida

Attorney General declined to appeal. Also, petitioners refused to participate in the supplementary proceedings conducted by the *Hoffman* court—notwithstanding their admission that that court was not a party to the alleged fraud. Instead, petitioners and their erstwhile *amicus* would have the federal court sit as a reviewing court and engage in the very same fact-intensive inquiry as had been conducted by the *Hoffman* court and thus provide petitioners with a "fresh bite at the apple." Petitioners simply cannot migrate to another tribunal in search of a decision they like better.

CONCLUSION

For the reasons above stated and upon the authorities cited, respondents respectfully pray that this Court deny the petition for issuance of a writ of certiorari.

Respectfully submitted,

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APPENDIX

PUBLISHED NOTICE OF HEARING ON PROPOSED SETTLEMENT OF CLASS ACTION

* * *

Notice is hereby given that a hearing will be held in the Circuit Court of Mobile County, Alabama at the County Courthouse in Mobile, Alabama at 8:00 (a.m.) on the 10th day of January, 1994, to determine whether Judge Kittrell should approve and confirm a proposed Consent Decree settling all aspects, both monetary and equitable, of the above-styled lawsuit as fair, reasonable and adequate. This notice is not an expression by the Court as to the merits of any claim or defense asserted by the parties. Copies of the proposed Consent Decree, a more complete notice of the Settlement terms and your rights as a class member, as well as the prior proceedings in this case, are available for your review and inspection in the Clerk's Office at the County Courthouse in Mobile, Alabama during regular business hours. THIS NOTICE DOES NOT AFFECT YOUR OBLIGATION TO MAKE TIMELY PAYMENTS IN ACCORDANCE WITH THE TERMS OF YOUR MORTGAGE.

* * *

SUMMARY OF TERMS OF PROPOSED CONSENT DECREE

Beginning on the effective date of the Consent Decree, BancBoston will change to the aggregate method of analysis in the calculation and accumulation of escrow deposits. Previously, BancBoston has used the "Individual Item" accrual method. This change in method may result in some of the class members receiving either a

cash refund or a credit in their escrow accounts. Other class members will receive a reduction in the amount by which their escrow accounts are "short" of the necessary funds to be maintained in the escrow accounts. The procedures for implementing this change in methods, as well as the procedures for making the refunds or credits to the escrow accounts, are set forth in detail on pages 2-4 of the more descriptive written notice which each class member who reads this published notice is encouraged to request from Class Counsel.

In addition to the possibility of receiving either a cash refund or credit to their escrow account, some class members will also receive an interest payment from BancBoston. With the exception of class members whose loans were originated after September 1, 1990, all class members who currently have mortgages being serviced by BancBoston will receive a one-time payment of interest calculated according to a formula set forth in the detailed notice which can be obtained from Class Counsel. All class members who had mortgages serviced by BancBoston since May 28, 1981 but who no longer had those mortgages serviced by BancBoston as of November 9, 1993 will also receive a one-time interest payment, but only if those former mortgagors file a form entitled "Intention to Participate in Monetary Distribution", which form can also be obtained from Class Counsel.

Class Counsel will request the Court to award them a reasonable attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed certain analysis of the escrow accounts. Class Counsel has indicated that they will request a percentage not to exceed one-third of the economic benefit conferred on the class as a result of this

settlement. The Court will decide whether or not to award attorneys' fees to class counsel at the fairness hearing scheduled for January 10, 1994. This award of fees will include compensation for plaintiffs' counsel's monitoring of BancBoston's future compliance with the terms and provisions of the Consent Decree.

* * *

App. 4

[Dated January 24, 1994]

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN, and DEBORAH L. HOFFMAN,	)	
Plaintiffs,	)	No. CV-91-1880
v.	)	
BANCBOSTON MORTGAGE CORPORATION, and BANK OF BOSTON CORPORATION,	)	(Hon. Braxton L. Kittrell, Jr.)
Defendants.	)	

ORDER OF SETTLEMENT APPROVAL AND FINAL JUDGMENT

THIS MATTER COMES BEFORE the Court for a fairness hearing conducted on January 10 and 11, 1994 to determine final approval of the settlement reached between BancBoston Mortgage Corporation and Bank of Boston Corporation (hereinafter collectively referred to as "BancBoston") and the class represented by Carl F. Hoffman and Deborah L. Hoffman (the "Class"). Having considered the entire record in these proceedings, the report of the Special Master, the oral presentations of counsel and the objector, and the briefs, testimony and evidence presented, and being fully advised of the premises, the Court has entered the Consent Decree and hereby makes the following additional findings of fact and conclusions of law:

I. Events leading up to the Fairness Hearing.

The plaintiffs commenced this action on May 28, 1991, alleging that BancBoston required its mortgagors to pay an amount into escrow accounts for realty taxes, insurance, and other assessments which was in excess of the amount permitted by the mortgage contracts serviced or subserviced by BancBoston. The Plaintiffs alleged that BancBoston's practices with respect to the calculation and accumulation of escrow payments were a breach of the mortgage contracts and were unlawful. The Plaintiffs' complaint, and the subsequent amendments thereto, also contained allegations of other claims such as breach of duty, fraud, and violations of various state and federal laws.

BancBoston denied that its actions with respect to the escrowed mortgage loans that it services or subservices were unlawful or violated the mortgage contracts or any laws. BancBoston argued that the individual mortgage contracts, HUD, and RESPA regulations allowed. [sic] BancBoston to use the methodology it employed. BancBoston filed motions to dismiss on numerous grounds, which were denied.

On July 2, 1992, this Court granted the Plaintiffs' Motion for Class Certification and determined that the lawsuit should proceed as a class-action with Carl F. Hoffman and Deborah L. Hoffman as the representatives of the class.

On October 12, 1993, the Court granted a partial summary judgment in favor of the Plaintiffs and all class members on the breach of contract claim, declaring that the escrow account deposit requirements imposed by

BancBoston exceeded those allowed under the mortgage contracts.

Prior to entering into the proposed settlement agreement, the parties engaged in substantial motion practice and discovery, primarily in the nature of document review. After much arm's length and good-faith bargaining, the parties signed a global settlement on November 9, 1993 (the "Settlement Agreement"). The parties submitted the Settlement Agreement as a Consent Decree to this Court along with a motion for preliminary approval of the Consent Decree, a proposed order conditionally approving the Consent Decree, proposed forms of notice to be mailed to the Class and published in *USA Today*, the form giving notice to appear and object, the form for requesting exclusion, and the form for signifying an intention to participate in monetary distribution for sub-class two members.

On December 6, 1993, this Court entered an order granting the motion for preliminary approval of the Consent Decree, and BancBoston began mailing the approved notice to all current and past mortgage holders as provided in the Consent Decree.

II. The Notice of Hearing on Proposed Settlement of Class Action.

On December 6, 1993, BancBoston began mailing by first-class mail approximately 315,000 notice packets to every current mortgage holder and approximately 100,000 notice packets to the last known address of past mortgage holders who had an account with BancBoston within the last year. The notice packet sent to all class members included the court-approved Notice of Hearing

on Proposed Settlement of Class Action, a Notice to Appear and Object form, and a Request for Exclusion form. In addition, the notice packet to the past mortgagors contained the Intention to Participate in Monetary Distribution form.

In addition to the mailed notice packets, notice was published nationwide in the December 13 and 20, 1993 editions of *USA Today*. Class counsel set up message center telephone lines providing a layman's explanation of the terms of the settlement. Class counsel also fielded thousands of telephone calls and replied to hundreds of letters from the Class requesting additional information.

III. Requests for Exclusion, Objections to the Proposed Settlement, and Intentions to Participate in the Monetary Distribution.

Prior to the January 3, 1994 cutoff date established by the Court for the filing of Requests for Exclusion, approximately fifteen hundred such requests were filed with the Court.[1] Class counsel attempted in good faith to contact several of these people to determine the nature of the Request for Exclusion. Most of the persons contacted who requested exclusion did not wish to participate in any type of class action litigation or did not feel that BancBoston had handled their Individual account improperly.

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[1] Class counsel have represented to the Court that a complete list of those who have chosen to exclude themselves from the Consent Decree will be forthcoming as soon as all the forms are processed and compared among the parties.

In addition, approximately two hundred class members sent the Notice of Intent to Appear and Object by the deadline for filing such matters. Class counsel have in good faith attempted to contact each of the persons objecting to the class action, and found that all of the persons objecting to the settlement, except four, sent that form in only by mistake due to the similarity of that form and the Intention to Participate form. Of the remaining persons objecting, one complained that notice should also be sent prior to the settlement, one felt that people who have held their mortgages longer should get more interest, and the Florida Attorney General objected for reasons discussed more thoroughly below.

As of January 6, 1993, approximately 15,000 claim forms signifying the Intention to Participate in Monetary Distribution had been received by all the parties and the Circuit Clerk's office.

IV. The Fairness Hearing.

A. Substantive issues regarding the Proposed Settlement Agreement.

On January 10, 1994, this Court conducted a fairness hearing to determine whether final approval of the Consent Decree should be granted. At the fairness hearing, Class counsel presented evidence regarding the reasonableness of the Consent Decree. In addition, Class counsel reiterated the protracted and highly contested litigation manifested by this case, highlighting the extensive negotiations for settlement.

The only significant objector, the Florida Attorney General [sic] had two arguments addressing the substantive

merits of the Consent Decree. First, he argued about the preaccrual dates on the individual escrow accounts. The Florida Attorney General further argued that any unclaimed funds and interest payments for Florida residents should be paid to the office of the Florida Attorney General and should not revert to BancBoston. With respect to the argument concerning the preaccrual dates, this Court finds that the provisions concerning preaccrual in the Consent Decree are the same as those offered by the Florida Attorney General in his earlier proposed settlement with BancBoston. The Court further finds that the preaccrual provisions in the Consent Decree are consistent with and not materially different from those found in similar settlements such as the *Fleet Mortgage* and *GMACM* cases.

With respect to the second argument raised by the Florida Attorney General (unclaimed funds and interest payments), the Court finds that such a request would confer no additional benefit on the Class and is inconsistent with the treatment of unclaimed funds and interest payments in substantially similar escrow account class actions. The Florida Attorney General also failed to present statutory or other legal grounds to justify his request that the Florida residents' unclaimed funds and interest payments should revert to the office of the Florida Attorney General.

The principal benefit of the settlement is that BancBoston Mortgage Corporation shall hereafter use a formula to compute escrow account deposit requirements which plaintiffs contend more closely follows the provisions of each mortgage note. This will result in lower escrow account requirements for most mortgagors. The new formula or methodology to be adopted as a conse-

quence of this settlement is commonly referred to as "cash basis" or "aggregate override" analysis.

In addition to the change in the method by which BancBoston calculates the escrow deposits, the Consent Decree provides that BancBoston will promptly refund or credit to the mortgagor's accounts any cushion or surplus that results from the initial change in the accounting method. This will create a common fund of settlement proceeds.

BancBoston will also pay interest to each of the subclass one members (current mortgage holders) and to those subclass two class members (past mortgage holders) who timely filed an Intention to Participate in Monetary Distribution form as provided in Paragraph eight (8) of the Consent Decree. The interest paid to each subclass one member is $8.76, and $1.78 will be paid to each subclass two member. The interest increases the common fund of settlement proceeds.

Class counsel presented evidence regarding the economic benefit conferred on the Class as a result of the creation of the common fund. Class counsel submitted the affidavit of Dr. Albert Madansky and presented Mr. Walter McKean, C.P.A., to testify. Mr. McKean testified that the economic benefit to the Class could be calculated using a statistical sample of BancBoston's mortgage holders. Class counsel provided the affidavit of Mr. Michael Koster, Senior Vice President of BancBoston regarding the sampling techniques, and Mr. McKean testified that the sampling was valid.

Mr. McKean further testified that based on the sample, the average mortgage holder had 20 years left on his or her mortgage. The average interest rate on such a mort-

gage was 8.6 percent. Thus, Mr. McKean testified, if the average mortgage holder were to receive a $100.00 refund and apply it to his or her mortgage, he or she could reduce his or her principal $545.00 by the time his or her mortgage was paid off.

This Court finds that based on the testimony, the economic benefit to the Class is defined as the following:

(a) any cash refund to the class members as a result of the change in methodology;

(b) any credit or decrease reflected on a class member's escrow account in an overage, shortage or combination overage and shortage situation[2];

(c) Interest payments to the class member's escrow account.

While the foregoing constitutes clearly calculable economic benefits, this Court finds that the Class has accumulated other less easily quantifiable economic and noneconomic benefits such as:

(a) BancBoston shall hereafter be required to utilize a new escrow account analysis methodology when determining mortgage escrow account deposit requirements that will result in each class member's escrow account balance being reduced, in accordance with the most recent analysis completed by BancBoston, by an average of 19.0%.

(b) BancBoston, after performing its annual escrow account analysis, will immediately refund or credit the mortgagor's accounts in an amount equal to any escrow overages found in the escrow account.

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[2] The terms "overage" and "shortage" as used in this Order mean the same as used heretofore in BancBoston's annual escrow account statements sent to the individual mortgagor.

(c) The new escrow analysis methodology creates a reduction in the lien on the mortgagor's property because funds held in escrow accounts stand as security for the underlying debt.

(d) The class members have the option of receiving a refund immediately which creates much additional value in the face of increasing taxes (and the consequent increase in required escrow).

(e) Class counsel and their expert, Dr. Albert Madansky, will monitor BancBoston's compliance with the Consent Decree for the next three years.

Under the terms of the Consent Decree, the Class continues to reap the monetary benefits of the new methodology as long as his or her mortgage remains with BancBoston. It is this Court's opinion that this prospective relief is the most that could be maximized from this case even if the case had progressed to a very favorable jury verdict.

B. Attorneys' Fees.

At the fairness hearing, Class counsel submitted evidence regarding the amount of attorneys' fees this Court should award. Class counsel presented the affidavits of William J. Baxley, Edward L. Hardin, and George L. Beck. The Court heard testimony from J. Doyle Fuller and Richard T. Bounds who both stated that a fee equal to one-third of the settlement proceeds was reasonable and fair under Alabama law. Mr. Fuller has been involved in over 40 class actions in Alabama and further testified that the results achieved in this case would justify a fee of forty percent (40%) of the settlement proceeds. Mr. Bounds testified that he had reviewed the ex-

tensive pleadings and documents produced in this case, and further testified that in his experience, fees up to 40% and not less than one-third of the recovery were reasonable.

Class counsel submitted the affidavit of Mr. Michael Koster, Senior Vice-President of BancBoston who testified that under the last analysis performed by BancBoston, the difference in the escrow account portfo lio between the new and old methodology was 19%. Class counsel proposed that attorneys' fees be awarded as one-third of 19% of the balance reflected in the escrow accounts at the time that the annual escrow analysis is calculated.

The Florida Attorney General objected to the attorney's fee request, and essentially raised the following arguments in opposition to Class counsel's request for attorneys' fees:

(a) If any attorney's fees are due to Class counsel, BancBoston should be the party which directly pays the fees and they should not be awarded out of the benefit conferred on the Class as a result of the Consent Decree;

(b) If any fees are awarded, they should come solely from the interest payments to be made by BancBoston and not from the individual mortgagor's escrow account; and

(c) The *Fleet* and *GMACM* cases provided for a different attorneys' fee formula than the one proposed here by Class counsel.

With respect to the Florida Attorney General's arguments, the Florida Attorney General has failed to produce any statutory or legal authority that directs BancBoston to pay attorneys' fees. Class counsel, John

W. Sharbrough, testified that the Alabama Rules of Professional Conduct prevent such negotiation for fees from opposing parties when to do so would interfere with the lawyer's independence or the attorney-client relationship. Mr. Sharbrough further testified that in his opinion negotiations with the defendant would have interfered with his best judgment and compromised his independence. As a practical matter, any concession to pay fees by BancBoston would have diminished the class relief.

With respect to the Attorney General's third argument, Mr. Sharbrough testified that the *Fleet* and *GMACM* cases did not involve the change in accounting methodology to cash basis. In addition, the Court notes that this is the only escrow case of those proffered as evidence which proceeded as far as a partial summary judgment on the breach of contract issue.

Mr. Sharbrough testified that there are only three members in his firm, including himself. He further testified that the firm had turned away work because of the demands of this case, and that the firm's associate has devoted nearly all her time to this case. Class counsel will continue to have demands placed on them by the future monitoring and auditing for three years hence.

The Court has weighed the foregoing objections of the Florida Attorney General in making its determination of attorneys' fees as outlined below. However, it is this Court's opinion that the award of fees to class counsel in cases such as this one is a matter best left to the sound discretion of the Court.

It is this Court's further opinion that the attorneys representing the Class enjoy an excellent reputation, and have considerable expertise in consumer fraud class

action cases and cases involving excessive escrow deposit requirements in particular. They have prosecuted this case without any compensation whatsoever and have represented the Class on a contingency fee basis.

Based on the foregoing and having considered the entire record in these proceedings, the report of the Special Master, the oral presentations of counsel and the objectors, and the briefs, testimony, and evidence presented, it is the ORDER, JUDGMENT, and DECREE of this Court that:

A. The notice given to members of the Class by publication and by mail, as aforesaid, complied with all requirements of due process, all requirements of Rule 23 of the Alabama Rules of Civil Procedure, and constituted the best notice practicable under the circumstances. The former Fifth Circuit Court of Appeals has made it clear that Rule 23(e) mandates individual notice only to those potential class members who can reasonably be ascertained. *In re Beef Industry Antitrust Litigations*, 607 F.2d 167, 178-179 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).[3] Thus, any additional expense in locating and notifying any class members who may not have received individual notice would be outweighed by the tremendous expense of doing so, and which expense would materially reduce the fund available for all class members.

B. The number of those members who wish to exclude themselves from the Consent Decree is less than the

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[3] The Alabama Supreme Court has held that federal authorities, while not binding, are persuasive when interpreting the Alabama class action rule. *First Baptist Church v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727 (Ala. 1981).

number that would permit any party to withdraw from the settlement.

C. Due and adequate notice of the proceedings has been given to members of the Class, and a full opportunity has been offered to members of the Class to object to the Consent Decree and to participate in the hearing thereon. Thus, the Court finds that the Consent Decree is fair, reasonable and in the best interests of the Class as compared to the uncertainties of litigation of the claims involved, the significant cost, time and effort such litigation would entail on behalf of all parties regardless of the outcome, and the considerable burden that continued litigation would impose upon the Court and upon the relationship that exists between the plaintiffs, the class members, and defendants. The Court makes this determination based upon oral presentations by counsel, expert testimony, and the other evidence before this Court, and after duly considering and weighing the objections presented at the Fairness Hearing.

D. The usual and customary contingency fee in this locality is no less than thirty-three and one-third percent (33⅓%), and such fees frequently are between forty (40%) and fifty (50%) percent. In this case, because of the broad responsibilities and risks assumed by class counsel, and the unprecedented results achieved by Class counsel, Class counsel's efforts merit a fee based on a percentage of the economic benefit conferred by this settlement. The total fee recovery as set out below is found to be reasonable in light of the fact that the future benefit conferred upon the Class by this Consent Decree is substantial and is at least as valuable to the Class as the immediate refund to the Class of the settlement proceeds from the common fund. This Court makes this

determination after taking into the account the objections of the Florida Attorney General.

E. In place of the second sentence of Paragraph 9 of the Consent Decree and in accordance with the remaining provisions of the Consent Decree, the Court directs that BancBoston shall credit each Class members' account with the interest as provided in Paragraph eight (8) of the Consent Decree by April 1, 1994. At the beginning of each month, for accounts scheduled to be analyzed that month, BancBoston will deduct attorneys' fees from each escrow account in the amount of 28 percent multiplied by 19% multiplied by the escrow balance at that time. BancBoston will then perform the analysis using the new accounting methodology. BancBoston shall pay said fee to Ezell & Sharbrough, and shall provide Class counsel with documentation reflecting the calculations of said amounts. Ezell & Sharbrough shall apportion the fees between Class counsel in accordance with their prior agreement.

F. All of the claims deemed released by the named plaintiffs and Class members, in accordance with the provisions of Paragraphs 16 and 17 of the Consent Decree, shall be known as the Released Claims. Under this Order and the terms of the Consent Decree, the named plaintiffs and class members who have not requested exclusion from the Class are hereby severally and permanently barred and enjoined from asserting any of the Released Claims in any court or forum whatsoever.

G. BancBoston shall not change its customary and ordinary business practices with respect to any escrow account in any manner that will diminish or circumvent

any of the provisions of this Order or the Consent Decree.

H. The Parties are ordered to implement the Consent Decree and Consent Decree. [sic]

I. The Clerk of this Court is directed to furnish to BancBoston all of the Intention to Participate in Monetary Distribution forms it receives.

J. The fees and expenses of the Special Master are to be paid by class counsel. Otherwise, each party is to bear its own costs.

It is further hereby ORDERED, ADJUDGED and DECREED by this Court that the Consent Decree should be and is hereby ENTERED and APPROVED, and this Order is hereby entered as a final judgment pursuant to Rule 54, Ala. R. Civ. P.

GIVEN UNDER MY HAND THIS 24th DAY OF JANUARY, 1994.

_____

CIRCUIT COURT JUDGE

[Dated January 24, 1994]

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN and DEBORAH L. HOFFMAN, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO.
BANCBOSTON MORTGAGE CORPORATION and BANK OF BOSTON CORPORATION,	)	CV-91-1880
Defendants.	)	

CONSENT DECREE

WHEREAS, the plaintiffs, Carl F. Hoffman and Deborah L. Hoffman, on behalf of themselves and all others similarly situated, filed their complaint in this action against the defendants, BancBoston Mortgage Corporation and Bank of Boston Corporation (collectively "BancBoston" or "defendants"), on May 28, 1991; and

WHEREAS, BancBoston is a servicer of mortgage loans secured by one to four-family dwellings which mortgages or other security instruments ("mortgage" or "mortgages") provide for escrow payments of realty taxes and insurance ("residential real estate mortgage loans"); and

WHEREAS, plaintiffs alleged in their complaint, as amended, that BancBoston has required its mortgagors to deposit into their mortgage escrow accounts, from which realty taxes and insurance premiums are paid, an

amount in excess of the sums provided for in the standard-form mortgage contracts and that BancBoston's calculation and accumulation of escrow deposits is illegal; and

WHEREAS, BancBoston has denied the material allegations of the complaint, as amended, and continues to deny liability in any amount; and

WHEREAS, counsel for BancBoston has provided certain information and made certain representations to counsel for plaintiffs and the class regarding BancBoston's escrow practices and the methodology used by BancBoston in calculating and accumulating escrow deposits; and

WHEREAS, counsel for plaintiffs and the class has investigated the facts and the applicable law; and

WHEREAS, the plaintiffs and defendants have had the opportunity to evaluate their respective positions on the merits; and

WHEREAS, the issues before the Court are extremely complex and, if fully litigated, will likely result in protracted litigation, appeals and continued uncertainty as to outcome; and

WHEREAS, counsel for the plaintiffs and the class is qualified to evaluate the fairness, reasonableness and adequacy of this settlement on behalf of the plaintiffs and the class members; and

WHEREAS, the parties to this action desire to avoid the additional cost, time, effort and uncertainties which would result from the continuance of this litigation, regardless of the outcome, and desire to enter into the settlement embodied in this Consent Decree; and

WHEREAS, the parties agreed on all of the terms of this settlement through extensive arms-length negotiations between counsel for the plaintiffs and counsel for the defendants; and

WHEREAS, the attorneys for the parties reached agreement on the terms of relief to be afforded the plaintiffs and the plaintiff class prior to the discussion of the fees and expenses to be paid to the plaintiffs for their attorney's services in this action; and

WHEREAS, this settlement provides substantial benefits to the class, resolves substantial issues without prolonged litigation and provides certain current and former mortgagors of BancBoston Mortgage Corporation with a benefit significant in the aggregate; and

WHEREAS, settlement of this action at this stage will relieve the significant burden that otherwise will be imposed upon the Court and the parties; and

WHEREAS, the parties believe that this settlement is fair, reasonable and adequate and that the best interests of all concerned lie in this Consent Decree, with the attendant benefits to the plaintiffs and the class members, without the burden and uncertainties created by pending litigation; and

WHEREAS, BancBoston denies any wrongdoing and any liability whatsoever, BancBoston has concluded that it is in its best interest to settle the litigation on the terms set forth in this Decree in order to avoid further expense, inconvenience and interference with ongoing business operations; and

WHEREAS, the Court tentatively approved this Consent Decree on _____, 1993, based upon the

Court's initial determination that the settlement reached by the parties is fair, reasonable and adequate, and thereafter, the Court gave notice of the proposed Decree to the class members, notifying them of the terms of the Decree and of their opportunity to file and express objections to the Decree or any provision thereof and notifying them of each class member's respective rights and obligations with respect to the Decree, such notices being in compliance with Rule 23 of the Alabama Rules of Civil Procedure and due process; and

WHEREAS, the Court held a hearing on January 10, 1994 for the purpose of adducing evidence regarding the fairness, reasonableness and adequacy of the Decree, for the purpose of hearing any objections to the Decree or any provision thereof, and for the purpose of determining the fairness, reasonableness and adequacy of the Decree; and

WHEREAS, the Court, after considering the evidence adduced at the fairness hearing, has approved the Decree as fair, reasonable and adequate as to all affected parties and persons.

NOW, THEREFORE, the Court being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Court has jurisdiction over the subject matter of this action and the parties to this action.

2. This Decree is, and shall be, applicable to and conclusive and binding upon all parties to this action, including the named plaintiffs, members of the plaintiff class (named or unnamed), and defendants and their successors and assigns.

3. The Court confirms that the class consists of all persons (and in the case of deceased or disabled persons, their estates, personal representatives, beneficiaries or conservators) whose loan was secured by a residential real estate mortgage and for whom BancBoston or its predecessors acted as servicer at any time from May 18, 1981 to the present. The Court finds that the prerequisites of Rule 23(a) of the Alabama Rules of Civil Procedure are satisfied and, in addition, that the provisions of Rule 23(b)(2) and Rule 23(b)(3) are applicable.

4. Beginning within ninety (90) days after the effective date of this Consent Decree (or, at the sole discretion of BancBoston, sooner than the effective date), BancBoston shall adopt and institute the following changes with respect to the calculation and accumulation of escrow deposits for all residential real estate mortgage loans serviced or subserviced by BancBoston now or in the future. These changes are cumulative, and each may result in a change in the amount of funds required in an escrow account:

a) BancBoston shall estimate future escrow disbursements based upon current data and reports and other information which provide reasonable estimates of future escrow disbursements. BancBoston may use the prior year's escrow payments as a base for estimating future escrow disbursements.

b) BancBoston shall use the aggregate method of analysis in the calculation and accumulation of escrow deposits and may maintain a maximum of a two-month reserve in any given escrow account, except as otherwise provided in paragraph 4(d) of this Decree. At its customary annual analysis of each current and future mort-

gagor's escrow account (or more frequently if BancBoston so elects), BancBoston shall prepare a running trial balance projection setting forth expected mortgage payment receipts, projected escrow disbursements, and expected escrow balances for the analysis period beginning with the date any change made in the amount of the mortgagor's payment as a result of the annual analysis becomes effective ("trial balance"). (By way of example, for an annual analysis performed in September, 1993, with an effective payment change date of November 1, 1993, BancBoston will prepare a trial balance from November 1, 1993 to October 31, 1994. BancBoston shall calculate the trial balance based on BancBoston's reasonable estimate of the amounts of the items to be disbursed from the escrow account during the analysis period).

In preparing the trial balance, BancBoston shall assume the disbursement of an escrow item, in any given month, will post-date BancBoston's receipt of the mortgagor's mortgage payment for that month, except that BancBoston shall be entitled to assume the disbursement of an escrow item whose projected disbursement date is from the first through the fifteenth day of the month, will predate BancBoston's receipt of the mortgagor's mortgage payment for the month of disbursement. To the extent BancBoston cannot project an expected disbursement date within a given month, BancBoston shall assume the receipt of the mortgagor's mortgage payment will predate disbursement of the related escrow item.

c) To the extent the expected lowest balance in the escrow account exceeds one-sixth (1/6) of the anticipated total amount of the escrow items that are due during the analysis period ("1/6 low point"), then

BancBoston shall: (1) automatically prorate the determined surplus and reduce the mortgagor's payments (except in those states that do not permit applying the surplus in this manner); or (2) upon request, refund the surplus to the mortgagor; or (3) upon request, apply the surplus to principal; or (4) upon request, apply the surplus to the next payment(s), provided that the mortgage is not in default, otherwise delinquent, or the resulting escrow on deposit is not less than the escrow needed for future escrow disbursements. Notwithstanding the foregoing, BancBoston may collect and hold an amount exceeding the 1/6 low point set forth above if the mortgagor so requests.

d) BancBoston shall use the aggregate method of analysis and reasonable estimates of future disbursements (subject to the terms of paragraph 4(a)) in the calculation and accumulation of escrow deposits and shall maintain (i) no reserve in the escrow account with respect to FNMA/FHLMC mortgages that contain language substantially the same as the language contained in the documents attached to this Decree and that were entered into prior to September 1, 1990, and (ii) one month's reserve in the escrow account with respect to (a) VA mortgages and (b) FHA mortgages that contain language substantially the same as the language contained in the documents attached to this decree as Appendix B and that were entered into prior to September 1, 1990. The aggregate projected escrow account balance for these mortgages shall be anticipated to fall to zero or one-twelfth (1/12), as the case may be, at least once during the twelve (12) month period following the effective payment change date. BancBoston shall treat surpluses in accordance with the provisions of paragraph 4(c)(1)-(4) of

this Decree and shall treat shortages in accordance with the provisions of paragraph 4(f) of this Decree. Notwithstanding the foregoing, BancBoston may collect and hold an amount exceeding the zero low point set forth above if the mortgagor so requests.

e) Subject to applicable law, (1) the selection of the appropriate analysis date and effective payment change date shall be at BancBoston's discretion; and (2) BancBoston is permitted to perform its escrow analysis pursuant to the above provisions more frequently than once a year, and may, at its discretion, change the date of any given mortgagor's escrow analysis. In addition, the parties and the Court recognize that in applying the above provisions, BancBoston is performing a projection of future events. As such, assuming BancBoston has acted in good faith, BancBoston shall have no liability if the actual billing amounts, disbursement dates, or other projection items differ from those assumed at the time of analysis, or if errors are made in good faith and the escrow accounts affected by such errors are corrected after discovery. By way of example, but not limitation, BancBoston shall be entitled to utilize prior year disbursement dates in setting expected disbursement dates for the upcoming year.

f) BancBoston shall collect escrow shortages (defined as the deficiency in funds determined to exist during the escrow analysis performed in conjunction with the methods described in section 4(b)) by spreading the shortage over: (1) not less than six (6) months; or (2) the number of months until the next escrow analysis, at BancBoston's sole option. Notwithstanding the foregoing, BancBoston may collect escrow advances ("negative escrow balances") by sending written notice of the de-

ficiency to the mortgagor and requesting one or more payments to cure that deficiency to begin not less than thirty (30) days after the date of the notice.

g) If a mortgagor provides evidence of payment of realty taxes and insurance for any given period (other than by BancBoston from escrow funds), BancBoston shall promptly refund any realty tax or insurance deposits accumulated for that period, provided that the mortgage is not in default, otherwise delinquent, or the resulting escrow on deposit is not less than the escrow needed for future escrow disbursements.

h) BancBoston, the plaintiffs and all class members agree that the contracts, promissory notes, mortgages, deeds of trust, security instruments, and any and all other documents, understandings or agreements constituting, establishing or evidencing the contractual relationship between the plaintiffs and class members and BancBoston, or between the plaintiffs and class members and the entities for which BancBoston services, serviced, subservices or subserviced class members' loans ("the mortgage contracts") are hereby modified to allow BancBoston to service or subservice the loans of all plaintiffs and class members in accordance with the terms of this Decree.

5. Counsel for plaintiffs and the class has the right to monitor BancBoston's compliance with this Consent Decree for a period of three years following the effective date of the Decree. BancBoston agrees to cooperate with counsel for plaintiffs and the class and provide 300 sample loans selected at random for each of the next three years in order for counsel for the plaintiffs to ensure BancBoston's compliance with this Consent De-

cree. The random sample shall include loans for which there are multiple or different due dates for tax and insurance payments during the year.

6. In the event BancBoston believes that it is required to change its escrow practices in the future to comply with or conform to applicable statutes, regulations, case law, or standard-form mortgage contracts, which govern the mortgage contract signed by the borrower with respect to the methodology and formula by which escrow deposits are calculated and accumulated, BancBoston shall give thirty (30) days advance notice of such proposed change or modification to counsel for the plaintiffs and the class. The notice shall identify the proposed change or modification, explain why BancBoston believes that the proposed change or modification is required and state how BancBoston intends to implement the proposed change or modification. If BancBoston and counsel for plaintiffs and the class cannot agree that the change or modification is either required or not required, counsel for plaintiffs and the class shall have an additional thirty (30) days within which to file a written objection with the Court and to seek a hearing before the Court to determine whether the change or modification is required. If counsel for the plaintiffs and the class does not file a written objection within the time period stated above, BancBoston may implement the change or modification.

7. BancBoston shall pay Two Thousand Five Hundred Dollars ($2,500.00) to each of the two class representatives, Carl F. Hoffman and Deborah L. Hoffman, for their services as named plaintiffs and class representatives.

8. In addition to the amounts to be paid to eligible class members under paragraphs 4(c) and (d) of this Decree, BancBoston shall make a single payment to each eligible class member in complete satisfaction of all claims that were raised or could have been raised in this action, as well as any and all other claims for damages, prejudgment interest, postjudgment interest or any other monetary or injunctive relief not otherwise provided for herein of any nature whatsoever which have been or could have been alleged in the complaint for the period May 28, 1981 to the effective date of this Decree ("the monetary distribution" or "the monetary fund"). Loans originated subsequent to September 1, 1990 are excluded from the single payment.

BancBoston shall distribute, as described above, the monetary fund to eligible class members within the class. The Court conditionally approved and does hereby finally approve two monetary subclasses which are more particularly described as follows:

A. Subclass Number One (consisting of active loans) is composed of all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced and for which escrow accounts were maintained for at least six (6) months, and is still servicing or subservicing as of November 9, 1993. With respect to this Subclass, BancBoston shall make a one-time payment to the Subclass members in an amount equal to fifty percent (50%) multiplied by seven point five (7.5) multiplied by (four (4) percent minus the interest rate paid on escrow, if any), multiplied by the average escrow surplus, which has been determined to be $58.41. The average escrow surplus was deter-

mined by using a statistically reliable sample of loans with escrow accounts which BancBoston serviced during the years 1989, 1990 or 1991. Each loan in the sample was serviced by BancBoston for the entire calendar year for which the loan was selected and the escrow account was analyzed during such year. The sample of loans is statistically valid and the loans were selected randomly such that the sample is representative of the loans serviced by BancBoston during 1989, 1990 and 1991. BancBoston then reviewed the escrow accounts of the random sample loans to identify each account which contained an escrow surplus and the amount of such escrow surplus. For purposes of this review, escrow surplus means the amount by which the lowest balance the escrow account reached during the year reviewed exceeded two months' escrow collection. This was determined by adding that year's normal escrow disbursements and dividing by twelve (12), then multiplying by two (2). The average surplus was then determined by adding the escrow surplus, if any, for each loan in the sample and then dividing that total by the number of loans in the sample.

Class members who are more than thirty (30) days past due in their mortgage payments will not receive a payment under the settlement. Banc Boston shall pay the above-determined amounts to the eligible class members by making an electronic deposit to each subclass member's escrow account within ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable and otherwise unreviewable.

B. Subclass Number Two (comprised of former mortgagors) is composed of all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced for a minimum of six (6) months anytime after May 28, 1981 for which escrow accounts were maintained and that have been paid off, transferred, waived, or otherwise removed from BancBoston's books and records as of November 9, 1993, but not including those persons whose mortgages were foreclosed or, for whatever reason, whose mortgages were in default at the time the mortgage was transferred, waived, or otherwise removed from BancBoston's books and records.

With respect to this Subclass, BancBoston shall make a one-time payment in an amount equal to 2.5 multiplied by 4% multiplied by 50% multiplied by the average escrow surplus to each Subclass member who timely files the requisite "INTENTION TO PARTICIPATE IN MONETARY DISTRIBUTION." For purposes of Subclass Number Two, BancBoston has determined the average escrow surplus to be $35.63 by using a statistically reliable sample of loans with escrow accounts which BancBoston serviced during the years 1989, 1990 or 1991. Each loan in the sample was serviced by BancBoston for the entire year for which the loan was selected and the escrow account was analyzed during such year. The sample of loans is statistically valid and the loans were selected on a random basis such that the sample is representative of the loans serviced by BancBoston during 1989, 1990, and 1991.

BancBoston then reviewed the escrow accounts of the sample loans to identify each account which contained an escrow surplus and the amount of such escrow surplus. For purposes of this review, escrow surplus means the amount by which the lowest balance in the escrow account during the year exceeded two (2) months' escrow collection. This was determined by adding that year's normal escrow disbursements and dividing by twelve (12) then multiplying by two (2). Loans where interest on escrow was paid during the year reviewed were counted as having no surplus. The average surplus was then determined by adding the escrow surplus, if any, for each loan in the sample and then dividing that total by the number of loans in the sample. BancBoston shall begin distributing these payments by mailing a check to the last known address of the claimant within ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable and otherwise unreviewable.

9. Counsel for plaintiffs and the class have requested the Court to award them a reasonable attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed the analysis set forth in paragraphs 4(b), (c) and (d) of this Decree. The Court hereby awards counsel for plaintiffs and the class an attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed the analysis set forth in paragraphs 4(b), (c) and (d) of this Decree in an amount equal to ____% of the economic benefit conferred on the class. In addition, BancBoston will pay plaintiffs

[sic] expert, Dr. Madansky, a maximum of $20,000 to cover the costs of monitoring compliance with this settlement. The Court finds that the amount awarded by the Court, together with the amount to be paid to Dr. Madansky, shall constitute a complete satisfaction of all claims against BancBoston for attorneys' fees for services rendered to the plaintiffs or the class in connection with any and all aspects of this litigation, and a complete satisfaction of any and all claims against BancBoston for reimbursement of any expenses incurred in connection with this litigation for any purpose whatsoever, including, but not limited to, out-of-pocket expenses, copying charges, witness fees, deposition costs, expert witness fees, paralegal expenses, and the like. This award of fees includes compensation for plaintiffs' counsel monitoring Banc Boston's compliance with the Consent Decree as set forth in paragraph 5 of this Decree. BancBoston shall distribute the above fees, costs and expenses to counsel for plaintiffs and the class on a monthly basis after the analysis set forth in paragraphs 4(b), (c) and (d) has been performed.

10. BancBoston shall begin distributing the monetary fund described in paragraph eight above not more than ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable, and otherwise unreviewable. In the event the Decree, or any order related thereto, is appealed, and an appellate court affirms the entry of the Consent Decree, such that the Consent Decree and each provision thereof is final, unappealable, otherwise unreviewable and binding, Banc Boston shall begin distributing the monetary fund within ninety (90) days after such affirmation.

11. BancBoston shall provide to counsel for plaintiffs a count of class members who have cashed distribution checks within 90 days of the effective date of the Consent Decree. BancBoston shall supplement the count within 180 days of the effective date of the Decree.

12. BancBoston's address shall serve as the return address on all envelopes used to mail checks to plaintiffs and class members. BancBoston shall maintain exclusive control over distribution checks which have been returned. If BancBoston is unable to deliver a distribution check or if a class member does not cash his or her distribution check within six (6) months of the date of the check, BancBoston shall have no obligation to honor such a check or to issue a new check, and said funds shall revert to and remain the property of BancBoston.

13. In the event any portion of the monetary fund cannot be paid to any specified eligible class member because that class member is deceased, that class member's share shall be distributed to the deceased class member's estate, personal representative, or heirs at law, as determined by the Court, in a manner which is equitable and consistent with the laws of the State of the deceased class member's residence upon due proof by any person claiming entitlement to the deceased class member's share. Any competing claims to a deceased class member's share of the monetary distribution in this case shall be determined by the Court subsequent to the entry of this Consent Decree in an appropriate proceeding upon due notice and opportunity to be heard by the competing claimants.

14. In addition to the monetary relief aspects of this case as explained and defined in paragraphs 4, 7, 8 and

9 above, the parties have agreed and this Decree embodies, in paragraph 4, many aspects of relief to operate prospectively which are for the benefit of the class members and future mortgagors. Such affirmative and prospective relief is in lieu of and in consideration for any further claim to monetary or equitable relief and is considered an essential component of this Decree. The substantial prospective relief contained in this Decree is more fully set forth in paragraph 4 hereinabove and will operate prospectively upon the effective date of this Consent Decree.

15. Defendants' obligations under this Decree are limited solely to the undertakings set forth in this Decree.

16. This Decree is final and binding upon the plaintiffs, all individual class members, except those who "opted out" or excluded themselves from the settlement class pursuant to Rule 23(c)(2) of the Alabama Rules of Civil Procedure, and BancBoston and their successors and assigns. The negotiation, execution and entry of this Decree, and the undertakings made by BancBoston, are in full and final settlement and compromise of all rights, duties and obligations of all parties, including the named plaintiffs and class members, with respect to any and all issues which relate in any way to any issue or claim for monetary or equitable relief in this action.

17. Upon the effective date of this Consent Decree, each plaintiff and class member who did not properly and timely opt out of the settlement class is deemed to have released and is hereby enjoined from suing, and each plaintiff and class member agrees to refrain from proceeding in any way against: (i) BancBoston; (ii) any and all direct and indirect subsidiaries, affiliates and

parents of BancBoston; (iii) the entities for which BancBoston serviced or subserviced their escrowed mortgage loans ("entities") (for the period during which BancBoston serviced or subserviced their escrowed mortgage loans); (iv) each officer, director, principal, agent, attorney, employer, employee, division, owner or partner of BancBoston or such entities (for any period during which BancBoston serviced or subserviced their escrowed mortgage loans); and (v) any successor (with respect for the period for which BancBoston did the servicing or subservicing), predecessor acquired by BancBoston, personal representative, estate, heir, beneficiary, administrator, or executor of any of the entities and persons described in (i), (ii), (iii), (iv) or (v) above, on any and all past, present, and future claims, actions, causes of action, rights or liabilities, known or unknown, based on, arising out of, or in any way relating or pertaining to (1) the escrow provisions of any mortgage contract that BancBoston uses in connection with the escrowed mortgage loans that it services or subservices; (2) BancBoston's methodology and formula for calculating and accumulating escrow deposits; (3) BancBoston's collection, accumulation, handling, custody, control, or use of the escrow funds accumulated as a result of the methodology and formula referred to in subparagraph (2) above, whether as trustee or otherwise; or (4) any of the events, statements, or allegations contained in plaintiffs' complaint, as amended. However, nothing within this decree shall release the following future individual claims: (a) late charge claims; (b) disputes over receipts of payments; (c) failure to make escrow disbursements in the name of the payee when payment has been received from the payee; (d) procurement of insurance; and

(e) ARM adjustments. This recital of exclusion of claims is in no way meant to suggest that such claims exist. Without limiting the generality of the foregoing, the released claims include all claims, actions, rights or causes of action arising under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"), regulations promulgated pursuant to RESPA, the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, Regulation Z, 12 C.F.R. § 226.1 *et seq.*, Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Parts 1-111 (1993), all state statutes prohibiting consumer fraud and/or unfair or deceptive trade practices of all states wherein class members reside, or the common law. Further, without limiting the generality of the foregoing, the released claims include all claims and causes of action that have been brought, or could have been brought, in this case, entitled *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, CV-91-1880, currently pending in the Circuit Court of Mobile County, Alabama, and the case of *Tatelman, et al. v. BancBoston Mortgage Corp., et al.*, Case Number 93-3411, currently pending in the Superior Court Department of the Trial Court of Suffolk County, Massachusetts.

18. Defendants believe that the practices used by BancBoston Mortgage Corporation to calculate and accumulate escrow deposits comply with all federal and state laws, have been explicitly approved by HUD, and are used throughout the mortgage banking industry. Therefore, neither the negotiation, execution nor entry of this Consent Decree shall constitute an acknowledgment or admission of liability in any amount by defendants.

19. The effective date of the Consent Decree is fourteen (14) days after the Decree has been finally approved by a court order which is final, unappealable or otherwise unreviewable.

20. The Court retains jurisdiction of this action for the purpose of issuing any and all orders or decrees as may be necessary to effectuate, clarify, modify, or enforce the purpose, intent and terms of this Consent Decree.

DONE this 24th day of January, 1994.

/s/
Circuit Judge

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